89-1157

No. .....

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

Norma Lynch, as successor personal representative of the estate of Dexter M. Evans, Jr., M.D., and Aetna Casualty and Surety Company,

Petitioners,

versus

Arthur Fleming, as guardian ad litem for Dedrick Fleming, an incompetent person,

Respondent.

ON WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

James B. Richardson, Jr.
1338 Main Street, Suite 808
Columbia, South Carolina 29201
(803) 799-9412

James W. Alford
Kay G. Crowe
R. Lewis Johnson
Barnes, Alford, Stork & Johnson
Post Office Box 8448
Columbia, South Carolina 29202
(803) 799-1111

Attorneys for Petitioners.

QUESTION PRESENTED

Is the Equal Protection Clause of the Fourteenth Amendment violated by a nonclaim statute which bars tort claims against the estate of a deceased tortfeasor after eight months if the tortfeasor had no liability insurance, but allows tort claims to be filed until the statute of limitations runs (as much as 19 years later) if the tortfeasor had insurance?

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No. .....

IN THE
SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1990

Ex Parte: Estate of Dexter M. Evans, Jr., and Aetna Casualty & Surety Company,

Petitioner,

In Re:

Arthur Fleming, as Guardian ad Litem for Dedrick Fleming, an incompetent person,

Respondent,

versus

Norma Lynch, as Successor Personal Representative of the Estate of Dexter M. Evans, Jr., M.D.,

Petitioner.

ON WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at ____ S.C. ____, ____ S.E.2d ____ (1989). The opinion is attached as Appendix A. The orders of the Court of Common Pleas for Florence County and the

Probate Court for Florence County are unreported. The order of the Probate Court is attached as Appendix B. The order of the Court of Common Pleas was in the form of an oral order from the bench.

JURISDICTION

The decision of the South Carolina Supreme Court was rendered on September 25, 1989. The decision is subject to certiorari review by virtue of 28 U.S.C. § 1257(3).

STATUTE INVOLVED

Section 62-3-803, 1976 S.C. Code Ann. (Cum. Supp. 1988), provides:

> (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, if not barred earlier by other statutes of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) within eight months after the date of the first publication of

notice to creditors if notice is given in compliance with § 62-3-801; provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this State are also barred in this State;

(2) within three years after the decedent's death, if notice to creditors has not been published.

* * * *

(c) Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge, lien, or other security interest upon property of the estate; or

(2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

CONSTITUTIONAL PROVISION

Amendment XIV:

Section 1. All persons born or naturalized in the United states, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

STATEMENT

Dexter M. Evans, Jr., was a physician who died on October 23, 1978. The executrix of his estate was discharged of her duties on May 8, 1980.

Seven years later respondent Arthur Fleming initiated this action for "subsequent administration" of Dr. Evans' estate. In a petition filed on November 25, 1987 in the Florence County, South Carolina, Probate Court, respondent alleged that his minor son Dedrick has a medical malpractice claim against Dr. Evans. Respondent Fleming further alleged that a professional liability insurance policy issued by petitioner Aetna Casualty & Surety Company covered the claim, so that South Carolina's eight-month nonclaim statute, § 62-3-803, 1976 S.C. Code Ann. (Cum. Supp. 1988), did not apply by reason of the statute's exemption from the bar of

the nonclaim statute for claims covered by insurance.

On December 14, 1987, Aetna filed a petition to intervene in the probate proceedings. Aetna alleged that the statutory exemption from the operation of the nonclaim statute only for claims to which insurance applied was in violation of the Equal Protection Clause of the Fourteenth Amendment.

In an order filed February 11, 1988 the probate court rejected Aetna's contention and granted the petition for subsequent administration of Dr. Evans' estate.

On March 4, 1988, Aetna and the estate appealed from the probate court to the Florence County Court of Common Pleas, raising the same equal protection contention. The Court of Common Pleas affirmed the order of the probate court.

Aetna appealed to the South Carolina Supreme Court on the same ground. On September 25, 1989, the South Carolina

Supreme Court affirmed the decision of the lower court.

ARGUMENT

South Carolina's nonclaim statute bars tort claims against the estate of a decedent for torts committed by the decedent unless the claim is presented within eight months after publication of notice to creditors. § 62-3-803(a)(1). This bar is subject to a single exception: the nonclaim statute does not apply to any tort claim covered by liability insurance. Thus, a tort claimant is barred in eight months if the estate is not insured against liability for the claim, while if insurance coverage exists the claimant has the benefit of the normal South Carolina statutes of limitations -- as long as 19 years[1] -- to pursue his claim against the estate. The effect is to shorten drasti-

---

[1] Section 15-3-40, 1976 S.C. Code Ann. (Cum. Supp. 1988).

cally the claim-filing period to eight months for claimants unlucky enough to have been injured by an uninsured decedent, even though the tortfeasor's estate may have ample wealth to pay the claim without regard to insurance.

The disparate treatment of claimants depending upon whether their claims are covered by insurance was justified by the South Carolina Supreme Court upon a single ground. That Court reasoned that the division of claimants into those with insured and uninsured claims "is reasonably related to the legitimate legislative purpose of allowing the claims of injured parties asserted within the statute of limitations while protecting the distributed assets of the tortfeasor's estate." ___ S.E.2d at ___; Appendix A at p. 18. The Court's reasoning is faulty because uninsured claims are barred in eight months **regardless of whether the assets of the estate have been distributed or not.** The estate may have undistributed

assets more than sufficient to pay the uninsured claim long after the lapse of the eight-month nonclaim period and throughout the running of the normal statute of limitations.

The only distinction between claimant number one and claimant number two is that payment of the first tort claim by the estate will be indemnified by insurance while payment of the second will not be indemnified. This is an arbitrary way to differentiate the rights of two injured persons with otherwise identical claims arising out of identical facts. The first claimant may have up to 19 years to discover and file his claim while the second is absolutely barred after eight months, solely because the loss may fall upon an insurance company in the first instance but on the personal estate of the decedent in the second.

In no other respect does the tort law of South Carolina differentiate between claims

and claimants based upon the existence of liability insurance coverage for their claims. On the contrary, South Carolina, as other jurisdictions, is careful to prevent any possibility that claims may be resolved differently based upon the existence of insurance. See Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1969). The presence or absence of liability insurance coverage has nothing to do with substantive tort law outcomes or procedure in South Carolina except in this one instance. South Carolina's tort system is expressly designed to and does function without recognition of insurance coverage except here, by truncating the statute of limitations for an uninsured claim but not for an insured one where the tortfeasor has died. A tortfeasor gains this signal advantage for his personal assets only in death -- an advantage not enjoyed during his lifetime. So long as the tortfeasor lives, his personal estate is at risk for the

normal limitation period, insurance or no. But after his death his estate is freed from risk after eight months as to uninsured claims while the normal limitation period continues running as to claims insured against. The **advantage** thus conferred upon the tortfeasor's estate as to uninsured claims is as arbitrary and irrational as is the **dis**advantage fastened upon claimants unlucky enough to have uninsured claims. There is no rhyme or reason to this legislative classification.

Closely in point is Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). An Illinois statute barred employment discrimination based upon physical handicap. The State's regulatory commission had 120 days to convene a fact-finding conference. It held such a conference on the 125th day. The Illinois Supreme Court held that the 120-day period was jurisdictional and the claim was barred. In a separate opinion joined by three other

Justices and agreed with by two others in another separate opinion, Justice Blackmun asserted that the statute violated the Equal Protection Clause as well as the Due Process Clause. In separating claimants into two categories -- one group whose claims are processed normally to resolution on the merits and another group whose claims are irrevocably terminated without review -- Illinois "draws an arbitrary line between otherwise identical claims." 455 U.S. at 439. In the case at bar South Carolina has granted to one class of claimants a favorable statute of limitations while depriving another class of that benefit even though their claims are identical in every respect, based solely upon the deceased tortfeasor's ownership of insurance. The deceased tortfeasor may have left the richest estate on record, but if he had no insurance the claimant whom he injured receives a drastically different and potentially crippling limitation period.

This disparate treatment is arbitrary on both ends. It makes no sense to divide identical claimants with identical claims into two classes, and it makes no sense to differentiate in death only between tortfeasors who are insured and those who are not. The only justification for the two classes of deceased tortfeasors offered by the South Carolina Supreme Court -- protection of assets of the deceased which have already been distributed to the heirs -- is facially invalid since the statute applies the same disparate treatment regardless of whether the assets of the estate have been distributed to the heirs when the eight-month nonclaim period has run.

The "rational basis" standard for equal protection review "is not a toothless one," Schweiker v. Wilson, 450 U.S. 221, 234 (1981), quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976). The State's classificatory scheme must "rationally advanc[e] a reasonable and identifiable governmental objec-

tive." Schweiker v. Wilson, 450 U.S. at 235. "[T]he Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out'," James v. Strange, 407 U.S. 128, 140 (1972).

In Lindsey v. Normet, 405 U.S. 56 (1972), the Court dealt with an Oregon statute requiring tenants challenging eviction proceedings to post a bond of twice the amount of rent expected to accrue pending appellate review. The bond was forfeited to the landlord if the appeal failed. The Court noted that the requirement, which burdened only tenants and not landlords, erected a "substantial barrier to appeal faced by no other civil litigant in Oregon." 405 U.S. at 77. The Court "concluded that the requirement bore 'no reasonable relationship to any valid state objective' and that it discriminated against the class of tenants appealing from adverse decisions in wrongful-detainer actions in an 'arbitrary and irra-

tional' fashion." Bankers Life and Cas. Co. v. Crenshaw, 108 S.Ct. 1645 (1988), quoting Lindsey v. Normet, 405 U.S. at 77. In like fashion the South Carolina statute involved here discriminates against claimants with uninsured claims and favors tortfeasors who lack insurance in a way found in no other aspect of South Carolina's tort system. Tortfeasors who are imprudent enough to forego insurance protection are specially protected while persons who are so unfortunate as to be injured by uninsured tortfeasors are penalized. This legislative classification denies the equal protection of the laws to injured plaintiffs and to insured defendants alike.

CONCLUSION

The exception carved out by the South Carolina Legislature to its nonclaim statute is arbitrary and irrational. It favors injured claimants whose only common trait is that they were fortunate enough to be injured by persons with insurance. It discriminates against injured claimants whose only fault was to be hurt by uninsured tortfeasors. The tortfeasor may be a millionaire, but if he is uninsured his victim is subjected to the truncated statute of limitations. The statute favors the estates of tortfeasors who failed to protect their personal assets with liability insurance. It discriminates against the estates of tortfeasors who were prudent enough to insure themselves. It treats the presence or absence of insurance as dispositive in a way unique in South Carolina tort law. It makes all this depend upon the accident of the tortfeasor's death

before the claim is resolved -- a fortuitous event which makes no difference whatever in any other aspect of the resolution of tort claims in South Carolina.

In short, it violates the Equal Protection Clause of the Fourteenth Amendment.

For these reasons petitioners urge the Court to grant the writ.

Respectfully submitted,

James B. Richardson, Jr.
1338 Main Street, Suite 808
Columbia, South Carolina 29201
(803) 799-9412

James W. Alford
Kay G. Crowe
R. Lewis Johnson
Barnes, Alford, Stork & Johnson
Post Office Box 8448
Columbia, South Carolina 29202
(803) 799-1111

Attorneys for Petitioner.

APPENDIX "A"
OPINION OF THE SOUTH CAROLINA SUPREME COURT

Ex Parte: Estate of Dexter M. Evans, Jr., and Aetna Casualty & Surety Company, Appellant,

In Re: Arthur Fleming, as Guardian ad Litem for Dedrick Fleming, an incompetent person, Respondent,

v.

Norma Lynch, as Successor Personal Representative of the Estate of Dexter M. Evans, Jr., M.D., Appellant.

Opinion No. 23084

South Carolina Supreme Court

Argued April 18, 1989.

Decided September 25, 1989.

GREGORY, Chief Justice:

This appeal is from a circuit court order affirming the probate court's order reopening the estate of Dr. Dexter M. Evans, Jr. We affirm.

Dr. Evans died on October 23, 1978, and the executrix of his estate was discharged on May 8, 1980. On November 25, 1987, respondent filed a petition to reopen the estate in order to assert a medical malprac-

tice claim against the estate and decedent's liability insurer, appellant Aetna Casualty & Surety Company. The circuit court affirmed the probate court's ruling that reopening the estate was permissible under S. C. Code Ann. § 62-3-803(c)(2) (1987).

Section 62-3-803(c)(2) allows liability claims against an estate otherwise disallowed by the nonclaim sections of the statute to the extent the decedent was protected by liability insurance. Appellants allege § 62-3-803(c)(2) denies them equal protection of the law because it subjects them to liability not imposed on estates without liability insurance.

In an equal protection review, great deference is accorded a legislative classification. The classification will be sustained if it is not plainly arbitrary and there is a reasonable hypothesis to support it. The requirements of equal protection are satisfied if: (1) the classification is reason-

ably related to the legislative purpose sought to be effected; (2) the members of the class are treated equally to those similarly situated; and (3) the classification rests on some reasonable basis. Smith v. Smith, 291 S.C. 420,424, 354 S.E.2d 36,29 (1987); Gary Concrete Products, Inc. v. Riley, 285 S.C. 498, 331 S.E.2d 335 (1985).

The classification at issue here is deceased tortfeasors with liability coverage at the time the alleged tort was committed. This classification is reasonably related to the legitimate legislative purpose of allowing the claims of injured parties asserted within the statute of limitations while protecting the distributed assets of the tortfeasor's estate. Cf. Moultis v. Degen, 279 S.C. 1, 301 S.E.2d 554 (1983). Similarly situated tortfeasors are treated equally since a claim against liability insurance may be asserted whether the tortfeasor is subsequently deceased or merely terminated insur-

ance coverage after the time of the alleged tort.

We conclude the classification is reasonable and hold S.C. Code Ann. § 62-3-803(c)(2)(1987) does not violate the equal protection clauses of the state and federal constitutions. Accord In re Estate of Daigle, 634 P.2d 71 (Colo. 1981).

Accordingly, the order of the circuit court is AFFIRMED.

APPENDIX "B"

ORDER OF THE FLORENCE COUNTY PROBATE COURT

This matter came before the Court for a hearing on Tuesday, January 5, 1988 at 10:30 a.m. Present at the hearing were the Petitioner and Edward L. Graham, Esquire, his counsel of record; and Kay Crowe, Esquire, as legal counsel to the Aetna Casualty & Surety Company.

In his Petition, Arthur Fleming asks the Court to reopen the estate of Dexter M. Evans, Jr., for subsequent administration and

Evans, Jr., for subsequent administration and to appoint a successor Personal Representative. He asserts hat his son has a medical negligence claim against the estate; and that Aetna Casualty & Surety Company provides liability insurance coverage of $1.1 million for damages caused by professional negligence on the part of the decedent physician, which covers the Petitioner's son's claim. Dr. Evans died on October 23, 1978, and his Executrix, Patricia M. Evans was discharged on May 8, 1980.

A copy of the Petition, and notice of the hearing, was given to all interested parties, including representatives of Aetna Casualty & Surety Company and George Thomy, who served as attorney to Patricia M. Evans when she was acting as Executrix. A Petition and Return was filed by Aetna Casualty & Surety Company, seeking to intervene in the matter and to object to the reopening of the estate and the appointment of the successor Personal Repre-

admits that it had in force a policy of liability insurance in favor of Dexter M. Evans, Jr., but objects to the reopening of the estate on the ground that to do so would violate Aetna's constitutional right to equal protection.

The South Carolina case of Moultis v. Degen, 279 S.C. 1, 301 S.E.2d 554 (1983) recognizes that closed estates may be reopened at the request of an interested party where there exists undistributed assets or after-discovered assets. A liability insurance policy covering negligent acts of the decedent is such an undistributed asset, which can justify the reopening of an estate for subsequent administration. Moultis v. Degen, supra; IN RE: Miles Estate, 262 N.C. 267, 138 S.E.2d 487 (1964). See also South Carolina Code § 62-3-803(c)(2). It is appropriate for a tort claimant, or someone acting on his behalf, to reopen an estate so that a tort action may be pursued and judgment,

if obtained, satisfied by the decedent's insurance policy. Id. The procedure followed by the Petitioner in this case is thus recognized as proper by the case law precedents. The same procedure, with minor exceptions not here pertinent, has been codified as statutory law by the new Probate Code. See SC. Code §§ 62-3-803(c)(2); 62-3-1008.

The equal protection argument advanced by Aetna as its sole ground for opposing the reopening of the estate has no merit for several reasons. The procedure for reopening an estate recognized by Moultis is applicable to all cases in which there are undistributed assets or after-discovered assets, and not just with respect to liability insurance coverage. While the Moultis dissent claimed that the majority was invading the legislative province, the General Assembly has subsequently codified the liability insurance policy exception to the Non Claims Statute at South Carolina Code § 62-3-803(c)(2). The

exceptions to the Non Claims Statute recognized by the Moultis case, and by the Probate Code, are entirely reasonable and rational. The procedure protects heirs and/or beneficiaries and enables them to give good title to properties, while permitting an aggrieved plaintiff to pursue the insurance policy or other undistributed assets. No injustice occurs with respect to the insurance company, for it is merely required to afford the protection for which a premium was paid. The constitutionality of a statute challenged on equal protection grounds is to be determined in accordance with the analysis described by the Supreme Court in Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36 (1987):

> In determining whether a statute violates the equal protection clauses of the State and Federal Constitutions, we must give great deference to the classification passed by the Legislature, and the classification will be sustained against constitutional attack if it is not plainly arbitrary and there is any reasonable hypothesis to support it. The requirements of equal protection are satisfied if (1) the classification bears a reasonable relation to the legislative purpose

> sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests upon some reasonable basis. (Citations omitted.) 291 S.C. at 424.

The classes and distinctions established by the case law and statutory provisions pertaining to subsequent administration clearly pass muster under a "reasonable basis" analysis, since the goal of orderliness and finality of administration of known probate assets has no logical connection to liability insurance or other undistributed assets. It is reasonable and logical to create a statutory exception to the Non Claim Statute for tort claims covered by liability insurance, since the insurance company is required to do no more than they agreed to do pursuant to the insurance policy contract for which they received the premiums. The Court therefore concludes that it is just and proper to reopen the estate for subsequent administration. Indeed, following the directive of the Supreme Court in Moultis, this Court has a

duty to reopen the estate for subsequent administration. 279 SC at 8.

Also in dispute is the issue of who should serve as successor Personal Representative. The original Executrix has moved out of state, and her present address is unknown. She has no financial interest in the liability insurance coverage sought to be reached by the Petitioner. Aetna, who has a very real interest in the subject matter, objects to virtually everyone suggested by the Petitioner as a prospective appointee except George Thomy, who previously served as counsel to the Executrix. Both sides stated to the Court that they had been informed by Mr. Thomy that he did not wish to serve as successor Personal Representative. At the hearing, Aetna proposed orally through its counsel two prospective appointees, Dr. Eddie Floyd and attorney Leroy Nettles. Petitioner objected strenuously to the appointment of Dr. Floyd on the grounds that

he is a medical doctor who has provided consulting services to insurance companies providing professional liability insurance to physicians. Petitioner objected less strenuously to the appointment of attorney Nettles, but did express concern that he may not wish to serve, or may have or could develop a conflict of interest in that he serves as attorney for the Lower Florence County Hospital where the facts giving rise to the claim occurred. Aetna made no showing that Mr. Nettles would consent to serve as Personal Representative. Since the hearing, Mr. Nettles has informed the Court that he does perceive an actual or potential conflict and therefore does not consent to serve. A final candidate for the position is Norma Lynch, who is an employee of this Court. Both sides indicated that they did not want to impose on Mrs. Lynch or the Court, but neither side raised an objection to her character or impartiality. The Court is

reluctant to appoint any Court employee, but she is the only prospective appointee mentioned who has been shown willing to serve as Personal Representative. Accordingly, under the unusual facts and circumstances of this case, the Court concludes that it would serve the ends of justice to appoint Norma Lynch as successor Personal Representative for the purpose of subsequent administration of this estate.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the estate of Dexter M. Evans, Jr., deceased, shall be, and the same is hereby, reopened for the purpose of subsequent administration; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Norma Lynch shall be, and she is hereby, appointed as successor Personal Representative of the said estate for the purpose of its subsequent administration.

AND IT IS SO ORDERED, this 11th day of February, 1988.

(2) 89-1157

No. _____

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Petitioners,

vs.

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Respondent.

ON WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Edward L. Graham
Zeigler and Graham
Post Office Drawer 150
Florence, South Carolina, 29503
(803) 662-3281

Attorney for Respondent.

QUESTION PRESENTED

Did the South Carolina Supreme Court properly rule that reopening the subject estate for subsequent administration of a liability insurance policy would not violate any equal protection rights of the estate of the insured tortfeasor or the liability insurance carrier?

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as amended

Constitutional provision:

Fourteenth Amendment 7

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Norma Lynch, as successor personal representative of the estate of Dexter M. Evans, Jr., M.D., and Aetna Casualty and Surety Company,

Petitioners,

vs.

Arthur Fleming, as guardian ad litem for Dedrick Fleming, an incompetent person,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondent does not question the Court's jurisdiction with respect to certiorari review under 28 U.S.C. §1257 (3), but would note that Petitioner has apparently not complied with Supreme Court Rule 29.4(c).

ARGUMENT

The South Carolina Supreme Court properly ruled that reopening the subject estate for subsequent administration of a liability insurance policy would not violate any equal protection rights of the estate of the insured tortfeasor or the liability insurance carrier.

This is a brain damaged baby case involving claims of negligence against a physician who is now deceased. Respondent Arthur Fleming alleges that Dr. Dexter M. Evans, Jr. negligently mismanaged his wife's labor and delivery, thereby causing his son to sustain catastrophic brain injuries. Dr. Evans had professional liability insurance in effect at the time through Aetna Casualty and Surety Company (hereinafter, "Aetna") with limits of $1.1 million, which covers the claim. However, before suit was brought on the claim, Dr. Evans died; the tangible

assets of his estate were distributed; and his estate was closed.

In the case of Moultis vs. Degen, 279 SC 1, 301 S.E.2d 554 (1983), the South Carolina Supreme Court ruled that tort claimants were "creditors" subject to the bar of the South Carolina nonclaims statute then in existence. The Moultis court expressly observed that closed estates may be reopened at the request of an interested party where there exist undistributed assets or after-discovered assets, which would be exempt from the bar of the nonclaims statute. A liability insurance policy covering harm caused by negligent acts of the decedent is such an undistributed asset, which constitutes an exception from the non-claims statute and can justify the reopening of an estate for subsequent administration. Moultis vs. Degen, supra.; In re: Miles Estate, 262 NC 267, 138 S.E.2d 487 (1964).

It has thus been expressly recognized by the South Carolina Supreme Court since 1983 that a tort claimant, or someone acting on his behalf, may reopen an estate so that a tort action may be pursued and judgment, if obtained, satisfied by the decedent's insurance policy. Id. Essentially the same procedure[1] was codified as statutory law in 1987 by the revised South Carolina Probate Code. See Sections 62-3-803 and 62-3-1008, Code of Laws of South Carolina, 1976, as amended. The procedure followed by Respondent Arthur Fleming in this case complies with the procedure sanctioned by the Moultis case and by the South Carolina

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[1] While the procedure was essentially the same, the statute differed from Moultis in terms of the tort claim exceptions to the bar of the nonclaims statute. Whereas, Moultis recognized an exception with respect to any undistributed or after-discovered asset, including but not limited to liability insurance coverage, the statute's only tort claim exception is where liability insurance was available to cover the claim.

Probate Code.

The sole basis Petitioners raise for challenging the reopening of the estate is their assertion that South Carolina Code §62-3-803(c)(2) violates the equal protection rights of the estate and its liability carrier. The nonclaims statute provides that all tort claims against the estate of a deceased tortfeasor are barred if not presented within eight months after publication of notice to creditors, except to the extent there exists liability insurance coverage. Petitioners claim the liability insurance exception of §62-3-803(c)(2) denies them equal protection of the law because it subjects them to liability not imposed upon an estate without liability insurance.

The standard for judicial review of Petitioners' equal protection challenge is the rational basis test, since the

challenged statute is a matter of economic or social regulation and involves no fundamental rights or suspect classes. In an equal protection review, great deference is accorded a legislative classification.

> Social and economic legislation ... that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose; such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality, and such legislation is valid unless the varying treatment of different groups or persons is so unrelated to the achievement of any combinations of legislative purposes that a court can only conclude that the legislature's actions were irrational.
> Hodel vs. Indiana, 452 U.S. 314 (1981).

> Although the rational basis standard is not a toothless one, it does not allow the United States Supreme Court, for purposes of determining whether the requirements of equal protection have been complied with, to substitute the courts'

> notions of good public policy for those of the [legislative branch]; as long as the classificatory scheme chosen by [the legislative branch] rationally advances a reasonable and identifiable governmental objective, the court must disregard the existence of other methods of providing equal protection, that, perhaps, the court would have preferred. Schweiker vs. Wilson, 450 U.S. 221 (1981).

The equal protection clause of the Fourteenth Amendment gives the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy. Ohio Bureau of Employment Services vs. Hodory, 431 U.S. 471 (1977). In reviewing the constitutionality under the equal protection clause of the Fourteenth Amendment of a statutory classification, it is not the function of a court to hypothesize independently on the desirability or feasibility of any possible alternatives to statutory scheme as

formulated. Caban vs. Mohammed, 441 U.S. 380 (1979). The classification at issue here is deceased tortfeasors with liability coverage at the time the alleged tort was committed. This classification is reasonably related to the legitimate legislative purpose of allowing the claims of injured parties asserted within the statute of limitations while protecting tangible assets of the tortfeasor's estate which are subject to prior administration and distribution.

Two legitimate legislative purposes come into play in the context of excepting from the general nonclaims statute claims against estates for which liability insurance exists: (1) allowing the claims of injured parties asserted within the statute of limitations and (2) providing orderliness and finality to administration of estates. Where a tortfeasor is

deceased, these legitimate legislative purposes can be in obvious conflict. It thus becomes legitimate legislative purpose to strike a balance between these conflicting goals. In effecting a balance, the South Carolina legislature has recognized that tangible, transferable estate assets are quite different from the benefits of a liability insurance policy. The legislative classification procedure protects inheritances of heirs and beneficiaries and permits them to give good title to properties. While innocent tort victims may consider it unjust to preclude such inheritances from being reached, it is a legitimate legislative function to make such policy decisions. It is entirely reasonable and rational to effect a different balance when a decedent tortfeasor had liability insurance coverage, since there is then the

opportunity to compensate innocent tort victims without jeopardizing inheritances and orderly administration of estate assets. The only asset sought to be reached, i.e., the liability insurance policy, has not been distributed and there is therefore no policy consideration to compete against the legitimate legislative purpose of allowing the claims of injured parties asserted within the statute of limitations.

No injustice occurs with respect to the insurance company for it is merely required to provide the insurance benefits for which a premium was paid. Indeed, if there were no liability insurance exception to the nonclaims statute, the liability insurance company would in effect receive a windfall profit from an abbreviated statute of limitations whenever its insured should fortuitously die soon enough after

committing a tort. Therefore, the challenged legislative classification rests upon a reasonable basis and is rationally related to legitimate purposes. Similarly situated tortfeasors are treated equally since a claim against liability insurance may be asserted whether the tortfeasor is subsequently deceased or merely terminated his insurance coverage after the time of the alleged tort.

Petitioners contend that the South Carolina Supreme Court's reasoning in its opinion in this case is imperfect because it focuses on protecting distributed assets while the exception to the nonclaims statute is not undistributed assets <u>per se</u> but liability insurance proceeds only. Petitioners' point misses the mark, because even if some estates contain undistributed assets other than liability insurance, there is not evidence of such in the case

at bar. If the standard for judicial review were to require that statutory classifications be perfect, then it is debatable that the liability insurance exception might be subject to improvement by enlarging it to cover all undistributed assets. Significantly, however, it is not the function of the courts in an equal protection review to impose on the states their own view of alternative classifications which might represent some improvement. See Schweiker, Ohio Bureau of Employment Services, and Caban, supra. The constitutional requirement is not perfection; the legislative scheme passes constitutional scrutiny if it reasonably and rationally advances a legitimate governmental objective. Id.; see also Hodel, supra. That the state may have furthered its underlying purpose more artfully, more directly, or more

completely, does not warrant a conclusion that the method it chose is unconstitutional. Hughes vs. Alexandria Scrap Corp., 426 U.S. 794 (1976).

Petitioners' Brief erroneously contends that in no other way does the tort law of South Carolina contemplate differing results depending on whether or not there exists liability insurance coverage. To the contrary, many cases have placed significance on the presence or absence of liability insurance. In the case of Brown vs. Anderson County Hospital System, 268 S.C. 479, 234 S.E. 2d 873 (1977), after partially abrogating the charitable immunity doctrine with respect to hospitals, the court expressly stated the abrogation would be applied prospectively only, to allow affected hospitals an opportunity to purchase liability insurance. Similarly, in the case of Elam

vs. Elam, 725 SC 132, 268 S.E.2d 109 (1980), the court held that liability insurance "is a relevant factor to be considered by this court in evaluating the continued vitality" of the parental immunity doctrine; and the court in Elam went on to abolish that doctrine. The case of Powers vs. Temple, 250 S.C. 149, 156 S.E. 2d 759 (1967) cited by the Petitioners, holds that the issue of insurance availability should not be improperly injected into a jury trial, but that case also recognizes that the judge has a duty to take into account the availability of insurance coverage and a recovery from joint tortfeasors and adjust the jury's verdict accordingly.

Petitioners can find no solace in the case of Lindsey vs. Normet, 405 U.S. 56 (1972). That Oregon case involved a constitutional challenge to a statute which

required tenants challenging eviction proceedings to post a bond of twice the amount of rent expected to accrue pending appellate review. The bond was forfeitable to the landlord if the appeal failed. The court recognized that the bond requirement erected a "substantial barrier to appeal faced by no other civil litigant in Oregon;" and concluded that the requirement bore "no reasonable relationship to any valid state objective" and thus unconstitutionally discriminated against the class of tenants appealing from adverse decisions. In contrast, in the case at bar Petitioners are not complaining of a denial of access to courts; they are attempting to add to the denial of access. They want to deny Respondent access to the courts for a hearing on the merits of his claim. Petitioners seem to be contending that the South Carolina nonclaims statute unfairly

prevents injured parties from bringing claims against estates of uninsured tortfeasors, but if that is the ill, the remedy is greater access not more restrictions on access.

Similarly, Petitioners' reliance on Logan vs. Zimmerman Brush Co., 455 U.S. 422 (1982) is misplaced. Logan is a case involving alleged employment discrimination against the handicapped. The challenged statute afforded the Illinois state regulatory commission 120 days within which to convene a fact-finding conference. It held such a conference on the 125th day. The claimant had filed his claim in a timely fashion, but the commission failed to meet within the time limits established by statute. The Illinois Supreme Court held that the 120-day period was jurisdictional and the claim was barred. This Court properly struck down the

challenged statute, some justices relying on equal protection grounds and others on due process grounds. The statute was found to have erected an arbitrary and unreasonable procedural barrier to the resolution of the claim. The Respondent Arthur Fleming also seeks a resolution on the merits of his claim. Petitioners are not interested in protecting the fundamental right of access to courts for adjudication of disputes. They are trying to add to the denial of access.

Petitioners claim that the liability insurance exception to South Carolina's nonclaims statute creates a lottery, and that Respondent is a lucky winner. If Respondent should successfully recover Aetna's liability insurance coverage as partial compensation for his son's catastrophic injuries, that hardly makes him lucky. How lucky can one be to sustain

catastrophic brain injuries as the result of another's negligence? It represents gross misfortune for any party to sustain catastrophic injuries due to the negligence of another. The misfortune would be compounded if the negligent tortfeasor is immune from suit, thus depriving the injured party of his claim to just compensation. If Petitioners' concern is genuinely for those unfortunate victims who cannot assert their claims because they are dealing with the estate of an uninsured tortfeasor, the way to eliminate such a result is to allow those victims' claims also, not to deny access to the courts of other injured parties whose claims are against the estates of insured tortfeasors. It is suggested that what Petitioners really want is for Aetna to reap the windfall profit of avoiding their obligations due to the fortuity of their

insured's unexpected early death. If Aetna is forced to defend the claim on its merits, that hardly makes Aetna an unlucky loser, since Aetna is required to do no more than live up to its bargain to provide liability insurance coverage.

Supreme Court Rule 10 contemplates that a petition for Writ of Certiorari will be granted only where there are special and important reasons therefor. Petitioners have not made a showing that the Supreme Court of South Carolina has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. Petitioners have made no showing that the Supreme Court of South Carolina has decided an important question of federal law which has not been, but which should be, settled by this court. Petitioners have made no showing that the

South Carolina Supreme Court has decided a federal question in a way that conflicts with any applicable decision of this court.

This case involves no fundamental right and no suspect class. The challenged statute furthers a legislative objective in a reasonable manner, and is in accord with that of other states. See, e.g., In Re: Miles Estate, supra.; In Re: Estate of Daigle, 634 P. 2d 71 (Colo. 1981).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ZEIGLER AND GRAHAM

BY: 

Edward L. Graham,
Attorney for Respondent